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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER NELSON,

Defendant and Appellant.

D073963

(Super. Ct. No. SCS293296)

APPEAL from a judgment of the Superior Court of San Diego County, Roderick W. Shelton, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

After a day of boating and drinking, Christopher Nelson drove his girlfriend, Jami, and her friend, Aubrey, home. During the ride, Aubrey and Annette, the driver of another

vehicle, observed Nelson punch Jami in the face while Nelson's vehicle was stopped at a stoplight. A jury convicted him of battery on a significant other (Pen. Code, § 243, subd. (e)(1)), and assault (Pen. Code, § 240).¹ The trial court placed Nelson on summary probation. Nelson appeals, claiming the court erred by admitting past uncharged acts of domestic violence against Jami under Evidence Code² section 1109. He also contends there was insufficient evidence showing that he did not act in self-defense. We affirm the judgment.

FACTUAL BACKGROUND

At trial, Jami, Aubrey, Annette and Nelson gave differing accounts as to what transpired. Jami also recanted her earlier statements to police. Following the well-established rule of appellate review, however, we recite the facts in the light most favorable to the judgment. (*People v. Bogle* (1995) 41 Cal.App.4th 770, 775.)

Background

Jami testified that she gets "angry and violent" while drunk and has always been like that, even with previous boyfriends. She admitting striking a previous boyfriend, D.J., in the back with an object, while in the presence of D.J.'s mother. D.J.'s mother testified that she saw Jami hit her son and, on another occasion, push him. She stated that

¹ The jury found him not guilty of inflicting corporal injury on his significant other (Pen. Code, § 273.5, subd. (a)), assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)), and violation of a protective order. (Pen. Code, §§ 136.2, 166, subd. (c)(1)).

² Undesignated statutory references are to the Evidence Code.

Jami "would go off if she was drinking." Jami admitted scratching and hitting Nelson in the past. Three of these incidents resulted in the police being contacted.

The Incident

On a day in April 2017, Nelson took Jami out on his boat. The couple brought two magnum-sized bottles of wine and some beer. While on the water, they met some friends on another boat, including Jami's friend, Aubrey. Aubrey boarded Nelson's boat and, according to Jami, brought two additional magnum wine bottles. Jami claimed that she and Aubrey finished the wine throughout the day, while Nelson drank beer.³ Aubrey claimed that Nelson and Jami got into a heated argument on the boat, but Jami denied this. Aubrey decided to stay with Nelson and Jami. During the ride home, Jami sat in the front passenger seat and Aubrey sat in the back seat while Nelson drove and hauled the boat on a trailer. Aubrey, Nelson and Jami all testified that the couple verbally argued during the ride. There is conflicting evidence regarding who made the argument physical.

Annette, the driver of another vehicle, testified that her daughter alerted her that people were arguing and fighting in the car next to them. While both cars were stopped at a stoplight, Annette looked to her left and saw the driver and passenger arguing and

³ Aubrey denied bringing two magnum bottles of wine onto Nelson's boat and testified that six people shared one magnum bottle of wine. After the incident Jami told an officer that Nelson drank 12 beers and tequila. At trial, Jami claimed that there was no tequila on the boat and that she could not remember telling an officer that Nelson had been drinking tequila.

yelling at each other. She then saw the driver punch the passenger with a closed fist.⁴ This startled Annette because the punch appeared to be with "full force." After this strike the passenger continued to argue while fighting back. The passenger then rolled down the window and threw something outside. The driver struck the passenger again. After this, both cars crossed the intersection and Annette saw that the vehicle was moving erratically and swerving into other lanes. Annette called 911.

Aubrey testified that Nelson and Jami argued and when the vehicle was stopped at a stoplight, Nelson "side-punched" Jami with his right hand. Aubrey claimed that Jami had not made any physical contact with Nelson, or threatened to make physical contact, before he threw the punch. Aubrey stated that Jami immediately started bleeding after Nelson struck her. Aubrey denied seeing Jami throw any of Nelson's property out of the vehicle. After they got out of the vehicle and to a safe location, Aubrey took a photograph of Jami's face because there was so much blood.

During cross-examination, defense counsel impeached Aubrey with her preliminary hearing testimony where she stated that Nelson and Jami yelled, that the couple got a little physical, meaning that both were grabbing the other person's arm, and there was a punch to the face. Before the punch Aubrey saw Jami grab Nelson's glasses off his face, but she could not recall if Jami grabbed the steering wheel. Aubrey told a police officer after the incident that Nelson hit Jami four times while at a stoplight.

⁴ Defense counsel later impeached Annette with her testimony at the preliminary hearing where she stated that the hit was more like a slap.

Jami told police after the incident that Nelson hit her face with a closed fist while stopped at a light. The officer saw an abrasion on Jami's forehead covered by a bandage. At trial, Jami recanted most of her original statements to police. She testified that while "really drunk" she "went off" on Nelson by yelling at him and hitting him while he tried to calm her down. She got even more angry and started to throw things out the window. Jami denied that Nelson hit her in the face and claimed that Nelson never touched her. She claimed that the nose piece from her sunglasses caused the cut on her forehead because they had a sharp edge. She asserted that she made up her earlier statements to police to get Nelson in trouble.

Nelson's Testimony About the Incident

Nelson claimed that while driving with his boat trailer, Jami became physical with him and started grabbing at his sunglasses that were on the front of his shirt and grabbed at the steering wheel at least once. Jami then got in his face, by leaning over the center console and yelling at him. Nelson was worried that Jami's actions would cause an accident. Nelson held his right arm up with a closed fist to block Jami's blows and to prevent her from coming over the center console. An officer saw that Nelson's right forearm had a bruise.

Nelson admitted that he and Jami were yelling at each other while stopped at a stoplight, but he denied hitting Jami in the face. He claimed that he pushed Jami's face away with an open hand. Nelson described his contact with Jami's face as "incidental" because she came toward him and he never came toward her.

DISCUSSION

I. *ALLEGED EVIDENTIARY ERROR*

A. *Additional Background*

Before trial, the People moved to introduce, and the defense moved to exclude, evidence of domestic violence Nelson perpetrated against Jami during their relationship under section 1109. The court tentatively ruled that Aubrey's proposed testimony about seeing bruises on Jami after Jami claimed that Nelson had struck her was admissible under section 1109.

During trial, over defense counsel's objection, the prosecutor elicited the following testimony from Jami:

"Q Within the period of time that you have known [Aubrey] and hung out with her, you said—as you said, have you had any injuries—visible injuries on your body as a result of the defendant being physical with you?

"A No.

"Q You never told her that bruises or scratches that you had on your body were the result of the defendant?

"A Absolutely not. No."

When questioning Aubrey, the prosecutor impeached Jami's previous testimony:

"Q Throughout the year that you have known [Jami], did you ever see any bruises or scratches on her?

"A Yes.

"Q And did she ever indicate whether those injuries were caused by the defendant?

"A Yes.

"Q Did she say they were caused by him?

"A They were caused by him."

During cross-examination, Aubrey admitted that she did not know whether Jami's wounds were defensive injuries. The court later instructed the jury with CALCRIM No. 852A, which states in part: "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged domestic violence. . . . [¶] If the People have not met this burden of proof, you must disregard this evidence entirely." If the jury decided that Nelson had committed the prior acts, the instruction allowed that "you may, but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence, and based on that decision, also conclude that the defendant was likely to commit and did commit" the offenses charged. The instruction further admonished, "[d]o not consider this evidence for any other purpose."

B. General Legal Principles

Ordinarily, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (§ 1101, subd. (a).) An exception to this rule exists for cases involving domestic violence. (§ 1109, subd. (a)(1).) Section 1109 provides, in relevant part, "in a criminal action in which the defendant *is accused of an offense involving domestic violence*, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a), italics added.) In enacting section 1109, the

Legislature "considered the difficulties of proof unique to the prosecution of [domestic violence cases] when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333-1334.)

Evidence admissible under section 1109 is subject to exclusion under section 352 if the probative value of the evidence is outweighed by a "substantial danger of undue prejudice." (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) "The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) " "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

"The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) The record must affirmatively show that the trial judge did in fact weigh prejudice against probative value, but no more is required. (*People v. Clair* (1992) 2 Cal.4th 629, 660.)

We review the trial court's exercise of discretion in admitting evidence under section 352 for abuse and will not disturb the court's ruling "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

C. Analysis

Nelson asserts that the trial court improperly admitted Aubrey's testimony about previously viewing bruises on Jami because the testimony had little probative value, was unduly prejudicial, and amounted to a miscarriage of justice. Nelson claims that the case turned on whether he instigated the violence in the car and that Aubrey's testimony was not relevant to this issue and the jury was left to speculate how Jami suffered the bruises, such as whether he had inflicted them while acting in self-defense. We agree with the trial court's implied conclusion that the challenged evidence was not unduly prejudicial.

As the People correctly note, the evidence constituted a prior act of domestic violence and was admissible in this action where Nelson was accused of domestic violence. (§ 1109, subd. (a)(1); *People v. Kerley* (2018) 23 Cal.App.5th 513, 532 ["Section 1109 is triggered by the nature of the accusation, not by the sufficiency of the evidence presented to prove that accusation."].) The prior act involved the same parties, was not inflammatory compared to the charged offense, and did not require an undue consumption of time. It is not likely that the evidence misled or confused the jury, especially since the court instructed that it was to consider the evidence only if the prosecution had proved by a preponderance of the evidence that defendant committed the uncharged act.

Finally, the trial court instructed the jury that the evidence of prior uncharged domestic violence was admitted for a limited purpose and was not sufficient by itself to prove Nelson committed the charged crimes. (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 247 ["A limiting instruction can ameliorate section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose."].) Nothing in the record indicates the jury did not follow the instruction. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83 [juries are presumed to follow the trial court's instructions].) The trial court did not abuse its discretion in admitting the evidence.

II. SUFFICIENCY OF SELF-DEFENSE EVIDENCE

Nelson does not dispute that he used force against Jami. Rather, he claims that the defense established, as a matter of law, that he justifiably used force in self-defense because he harbored a reasonable belief that Jami's conduct would cause serious harm to either himself or the occupants of the vehicle. He asserts that the prosecution failed to rebut this showing by presenting substantial evidence establishing that he was, in fact, the initial aggressor.

At trial, the People have the burden of persuasion to show the nonexistence of a defense that negates an element of crime "beyond a reasonable doubt." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 570.) "Typically, the prosecution has the burden to prove a defendant did not act in self-defense, because self-defense negates an element of the offense." (*Id.* at p. 571.) "To justify an act of self-defense for [an assault charge . . .], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat . . . must be imminent

[citation], and ' . . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, italics omitted.) "[A]lthough the test is objective, reasonableness is determined from the point of view of a reasonable person in the defendant's position. The jury must consider all the facts and circumstances it might ' "expect[] to operate on [defendant's] mind." ' " (*Id.* at p. 1065.)

Where a defendant challenges the sufficiency of the evidence supporting a conviction, our task is to review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) It is not our function to reweigh the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), and reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) The testimony of a single witness, if believed by the jury, is sufficient to support a conviction, unless that testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal of a conviction for insufficient evidence is only required if under no hypothesis whatever is there substantial evidence to support the conviction. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

Here, the trial court properly instructed the jury with CALCRIM No. 3470. This instruction explained that lawful self-defense has three elements:

"1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger."

Nelson concedes that when the evidence is viewed most favorably to the prosecution, Annette's and Aubrey's testimony supports the verdicts. He claims, however, that neither witness could testify about the nature of the altercation between him and Jami *before* he struck Jami at the stoplight.

We agree that a passenger who grabs the steering wheel and physically assaults the driver of a moving vehicle creates an extremely dangerous situation. Annette, however, observed the couple arguing and then saw Nelson hit Jami in the face with a closed fist while Nelson's vehicle was stopped at a stoplight. This testimony was consistent with Jami's statement to police immediately after the incident—that Nelson hit her face with a closed fist while stopped at a light near Palm and Saturn Avenues. Aubrey, who was inside the car with Nelson and Jami, testified that Jami had not made any physical contact with Nelson, or threatened to make physical contact, before he punched Jami. Aubrey also did not see Jami grab the steering wheel.

On this evidence, the jury could have reasonably concluded that Nelson did not have a reasonable belief that he needed to use immediate force to defend against any danger that Jami presented. Rather, when Nelson struck Jami, the jury could have

reasonably concluded that Nelson had no right to use *any* force. Moreover, even assuming Jami initially started the altercation, Nelson had options other than hitting Jami—such as engaging his hazard lights, safely pulling his vehicle to the side of the road and calling the police.

The evidence, viewed in the light most favorable to the judgment, supports the jury's implied finding that Nelson did not act in self-defense. Nelson's argument ultimately turns on the credibility of the witnesses and a reviewing court neither reweighs evidence nor reevaluates a witness's credibility. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.